89- 1468

Supreme Court, U.S.
FILED
FEB 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

COMMONWEALTH OF PENNSYLVANIA,

Respondent

vs.

BERNARD D. RYAN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

1. DID THE COMMONWEALTH OF PENNSYLVANIA VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, THE PROHIBITION AGAINST DOUBLE JEOPARDY, WHEN THE PENNSYLVANIA SUPREME COURT RULED THAT PETITIONER'S PLEA OF GUILTY WAIVED THE DOUBLE JEOPARDY ISSUE.

2. WHETHER THE RULING OF THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA THAT A GUILTY PLEA WAIVES A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, IS IN CONTRAVENTION OF DIRECT DECISIONAL AUTHORITIES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

3. WHETHER THE COMMONWEALTH OF PENNSYLVANIA VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ENTITLING HIM TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA RULED THAT THE FAILURE OF COUNSEL TO RAISE A DOUBLE JEOPARDY CLAIM CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL, HOWEVER, THAT THE DOUBLE JEOPARDY CLAIM WAS WAIVED.

PARTIES BELOW

The following individuals were parties to the proceeding below:

Commonwealth of Pennsylvania

Bernard D. Ryan

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II. Reported Opinions Below

On January 8, 1990, the Supreme Court of Pennsylvania, Western District, at No. 2 W.D. Appeal Docket 1989, ordered and adjudged that the judgment of the Superior Court of Pennsylvania is reversed and Appellee's rape conviction was reinstated. (Not yet reported).

The Superior Court of Pennsylvania at No. 874 Pittsburgh, 1987, entered May 19, 1988, reversed the Order of Court of the Court of Common Pleas of Elk County, Pennsylvania, Criminal Division, entered on June 8, 1987, at No. 89 of 1978 (379 Pa. Super. 664, 545 A.2d 388 (1988)). (Reported without Opinion).

The Opinion of June 8, 1987, Court of Common Pleas of Elk County, Criminal Division, denying Petitioner's Post-Conviction Relief at No. 89 of 1978. (Not reported).

III. Statement of Jurisdiction

a. The judgment of the Supreme Court of Pennsylvania at No. 2 W. D. Appeal Docket 1989, was entered, filed and dated on January 8, 1990.

b. The Constitution of the United States of America, Article III, Section 2, which states "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

c. This Petition is directly derived from the Act of Congress, 28 United States Code §1257(3).

d. This Petition is directly derived from Supreme Court Rule No. 17(1)(b), which recognizes

jurisdiction in the following circumstances:

> When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals;

d. This Petition is directly derived from Supreme Court Rule No. 17(1)(c), which recognizes jurisdiction in the following circumstances:

> When a state court or federal court of appeals has decided an important question of federal law, which has not been but should be settled by this court, or has decided a federal question in a way in

conflict which applicable provisions of this Court.

IV. Constitutional and Statutory Provisions

The constitutional and statutory provisions at issue are set forth as follows:

A. The Constitution of the United States of America, Article V, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

> liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. The Constitution of the United States of America, Article VI, reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

C. The Constitution of the Commonwealth of Pennsylvania, Article 10, reads as follows:

> No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

V. Statement of the Case

Petitioner, Bernard D. Ryan, seeks a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania to review a judgment of that Court reversing the Order of the Superior Court of Pennsylvania and reinstating a Judgment of Sentence for a criminal conviction for the crime of Rape, originally entered on November 13, 1978. Post-conviction relief seeking dismissal, which is the subject of the within appeal, was denied by Order of Court of the Court of Common Pleas of Elk County on June 8, 1987, at No. 89 of 1978.

A. Procedural History

Petitioner, arrested in June, 1978, was charged with Rape, Aggravated Assault and Indecent Assault. On September 11, 1978, a jury was impaneled and sworn to

hear the trial of the case. Trial was scheduled to commence on October 11, 1978, in the Court of Common Pleas of Elk County before the Honorable Paul B. Greiner, Presiding Judge. On October 10, 1978, the District Attorney of Elk County, notified the Court Administrator that a Commonwealth witness was ill, unavailable to testify on October 11, 1978, and requested a continuance or postponement. A.3.[1]

On November 8, 1978, another jury was selected, impaneled and sworn. On November 13, 1978, the Appellant entered a plea of guilty to the charge of Rape, thereby discharging the second jury. A.3.

Following the entry of the plea, the Petitioner, pro se, filed certain motions pursuant to the state post conviction hearing act statute, (Title 42 Pennsylvania

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[1]"A. __" refers to the appropriate page of the separate Appendix filed contemporaneously herewith.

Consolidated Statues Annotated, Section 9541 et seq.), which were later appealed by Attorney James N. Daghir. The issue of double jeopardy was not raised by appellate counsel. (See Number 1316 Pittsburgh, 1983 in the Superior Court of Pennsylvania, Western District). Following an affirmation of the conviction, Petitioner filed motions and appealed pro se to the Superior Court of the Commonwealth of Pennsylvania (See No. 00062 Pittsburgh, 1986 in the Superior Court of Pennsylvania, Western District, Commonwealth v. Bernard Ryan) and by Order of Court dated June 30, 1986, the Superior Court reversed and remanded the case to determine if "trial and P.C.H.A. counsel were ineffective for failing to raise the double jeopardy claim." A.5, 55-61.

Within counsel then filed appropriate motions raising the claim for violation of the Double Jeopardy Clause of the Fifth

Amendment of the Constitution of the United States of America and the applicable provisions of the Constitution of the Commonwealth of Pennsylvania, Article I, Section 10, pursuant to the Post Conviction Hearing Act of Pennsylvania. (Title 42 Pennsylvania Consolidated Statues Annotated, Section 9541 et seq.). A.45-52. Following a hearing, the Court of Common Pleas, by Order of Court, denied the post conviction relief. An appeal was taken to the Superior Court of Pennsylvania and an Order entered on May 19, 1988, at No. 874 Pittsburgh, 1987, reversing the Order of Court of Elk County and vacating the conviction based upon a violation of the Double Jeopardy Clause of the Constitution of the United States of America. A.19.

The Respondent herein, petitioned for allocatur to the Supreme Court of Pennsylvania at No. 2 W.D. Appeal Docket

1989, on January 8, 1990. The Supreme Court of Pennsylvania reversed the Superior Court of Pennsylvania and reinstated the conviction of the lower Court by Order and Opinion dated January 9, 1990. A.1-18.

B. Statement of the Facts

Petitioner, arrested in June, 1978, was charged with Rape, Aggravated Assault and Indecent Assault at Criminal Number 89 of 1978. On September 11, 1978, a jury was impaneled and sworn to hear the trial of the case. Trial was scheduled to commence on October 11, 1978, in the Court of Common Pleas of Elk County before the Honorable Paul B. Greiner, Presiding Judge. On October 10, 1978, the District Attorney of Elk County, counsel for Respondent, notified the Court Administrator that a Commonwealth witness was ill, unavailable to testify on October 11, 1978, and

requested a continuance or postponement. At some unknown date after September 11, 1978, the case was rescheduled for November 15, 1978. Another jury was selected, impaneled and sworn on November 8, 1978. On November 13, 1978, the Petitioner entered a plea of guilty to the charge of Rape, thereby discharging the second jury. A.1-6.

Trial counsel for Petitioner admitted at an Evidentiary Hearing conducted on January 15, 1987, that prior to the acceptance of the plea by the Trial Court, that trial counsel had not ascertained whether the Commonwealth witness was available for trial on November 15, 1978, or would ever be available. Trial counsel never raised an objection to the dismissal of the jury on September 11, 1978, the impaneling of the November 8, 1978 jury, or the entry of the plea thereafter. A.32-44.

The Supreme Court of the Commonwealth of Pennsylvania in a Plurality Opinion, with Mr. Justice McDermott writing the Opinion with Mr. Chief Justice Nix filing a Concurring Opinion with the joinder of Mr. Justice Papadakos, Mr. Justice Lawson filing a Concurring Opinion and Mr. Justice Zappala concurring the result, implicitly agreed with the Superior Court of the Commonwealth of Pennsylvania, A.19-30, that the dismissal of the Petitioner's jury, sua sponte, by the trial court, constituted a violation of the Double Jeopardy Clause.[2] A.6-13. Particularly, the Concurring Opinion of Mr. Chief Justice Nix, held that the trial court failed to ascertain the

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[2]The various Opinions of the Supreme Court of the Commonwealth of Pennsylvania do not delineate between violations of the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States of America or Article I, Section 9 of the Constitution of Pennsylvania, although Petitioner's original pleadings and appellate brief clearly raised both claims.

actual condition of the allegedly ill Commonwealth witness, which prevented a finding of a manifest necessity to justify a declaration of a mistrial and avoidance of a double jeopardy claim upon retrial. A.14-16. The Supreme Court of Pennsylvania, in the Concurring Opinion, opined that the failure of counsel to raise the double jeopardy claim, as well as counsel's acquiescence in a guilty plea under the circumstances, clearly constituted ineffective assistance of counsel. A.14-16.

However, the Supreme Court of the Commonwealth of Pennsylvania reversed the Superior Court of Pennsylvania, as well as the Judgment of Sentence, and reinstated the conviction based upon the conclusion of law that by virtue of either of Petitioner's guilty plea, or his failure to raise the claim in a previous appeal, that such issue was waived. A.1-13.

VI. Reasons For Allowing The Writ

A. The highest Court of the Commonwealth of Pennsylvania while finding that the Double Jeopardy Clause of the Constitution of the United States has been violated, reversed the judgment of sentence and reinstated the conviction on the basis that a subsequent guilty plea waived such claim.

The highest Court of the Commonwealth of Pennsylvania agreed with Petitioner's original contention as contained in his Petition for Post Conviction Hearing Act Relief in the Court of Common Pleas of Elk County, and the Superior Court of Pennsylvania at No. 874 Pittsburgh, 1987, that his fundamental, constitutional right against being twice placed in jeopardy

under the Fifth Amendment of the Constitution of the United States of America was violated. The Appellate Courts of Pennsylvania held that when the Trial Court, sua sponte, discharged a jury based upon an allegation of the illness of a witness without making a record to ascertain whether such declaration of a mistrial constituted a manifest necessity without Petitioner's request or consent, such a violation occurred.[3] (See Commonwealth v. Ryan, Concurring Opinion). See United States v. Perez, 22 U.S. 579, 9 Wheat. 579 (1824); Downum v. United States, 372 U.S. 734 (1963); United States v. Jorn, 400 U.S. 470; Illinois v. Somerville, 410

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[3]Pennsylvania Appellate Courts long recognized the fundamental principle of the prohibition against Double Jeopardy as contained in the Fifth Amendment of the United States Constitution, as well as Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania. See Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727, cert. denied, Shaffer v. Commonwealth, 409 U.S. 867 (1972).

U.S. 458 (1973); United States v. Dinitz, 424 U.S. 600 (1976).

In direct contradiction to decisional authorities of your Honorable Court the Pennsylvania Court reversed the Judgment of Sentence and reinstated the conviction on the theory that the Petitioner's subsequent guilty plea waived such issue. It is well-settled that the entry of a guilty plea does not constitute a waiver of the right to claim that the criminal indictment should be dismissed under the Double Jeopardy Clause and/or Due Process of the Fifth Amendment of the Constitution of the United States of America. In the hallmark case of Menna v. State of New York, 423 U.S. 61 (1975), your Honorable Court held, inter alia:

> Where the State is precluded by the United States Constitution from hauling defendant into court on a charge, federal law requires that a conviction on that charge be set

> aside even if the conviction was entered pursuant to a counseled guilty plea. Blackledge v. Perry, 417 U.S. 2130, 94 S.Ct. 2098, 2103, 40 L.Ed.2d 628 (1974).[4]

Menna v. State of New York, supra, 423 U.S. at 424. See also United States v. DeFillipo, 590 F.2d 1228 (1979). Accordingly, the plurality Supreme Court of Pennsylvania has rendered a judgment, which violates Petitioner's rights under the Fifth Amendment of the Constitution of the United States.

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[4]See also Green v. Estelle, 601 F.2d 877, 878 (5th Cir. 1979); United States v. Broussard, 645 F.2d 504 (5th Cir. 1981).

B. The holding of the Supreme Court of the Commonwealth of Pennsylvania that the entry of the guilty plea constituted a waiver of the violation of the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States of America is in direct convention of decisional authorities of your Honorable Court.

Petitioner respectfully submits that the opinion and judgment of the Supreme Court of the Commonwealth of Pennsylvania should be reversed and/or vacated and that the conviction and Judgment of Sentence must be reversed. Petitioner couched his original claims for post-conviction relief on the basis of the Constitution of the United States of America, as well as the ancillary provisions of the Constitution of the Commonwealth of Pennsylvania, (Article I, Section 10). In reversing its own

Superior Court judgment of sentence, the Pennsylvania Supreme Court, sua sponte, relied on Commonwealth v. Anthony, 504 Pa. 551, 475 A.2d 1303 (1984). This authority and reliance thereon is in direct conflict with decisional authorities of this Honorable Court in Menna v. State of New York, supra, 423 U.S. at 242 and Blackledge v. Perry, 417 U.S. 21 at 30 (1974). As Mr. Justice Stewart eloquently stated in Blackledge v. Perry, the following principles apply in the case-at-bar:

> Last Term in Robinson v. Neil, 409 U.S. 505, 35 L.Ed.2d 29, 93 S.Ct. 876, in explaining why the Double Jeopardy Clause is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe the procedural rules that govern the conduct of a trial." Id., at 509, 35 L.Ed.2d 29. While our judgment today is not based upon the Double Jeopardy Clause, we think that the

> quoted language aptly describes the due process right upon which our judgment is based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.

Blackledge v. Perry, 417 U.S. 21 at 30 (1974).

C. The highest Court, the Supreme Court of the Commonwealth of Pennsylvania, has in a Plurality Opinion determined that Petitioner's constitutional right under the Sixth Amendment of the Constitution of the United States of America, entitling him to the effective assistance of counsel, was violated when trial counsel failed to raise the Double Jeopardy claim, but ruled that the claim was waived.

In the Concurring Opinion of Mr. Chief Justice Nix of the Supreme Court of the Commonwealth of Pennsylvania, the Court addressed Petitioner's argument that the entry of the guilty plea could not constitute a waiver of constitutional claims and if it did so, it was not based upon the effective assistance of counsel and therefore, was not knowing and

voluntary. Citing the landmark case of Strickland v. Washington, 466 U.S. 668 (1984). The Concurring Opinion, however, determined that because the Petitioner had previously filed a Petition for Post Conviction Relief, the claim of ineffective assistance of counsel was waived based upon the authority of Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988). In Lawson, the Pennsylvania Supreme Court attempted to strictly proscribe the repeated and abusive use of post conviction relief petitions requiring that a subsequent petition should be dismissed absent a "strong prima facie showing. . . that a miscarriage of justice may have occurred. Commonwealth v. Lawson, supra, at 113, 549 A.2d at 112. The Concurring Opinion summarily applied Lawson in this case to the constitutional right of a violation of the Double Jeopardy Clause and/or the Due Process Clause of the Fifth

Amendment of the Constitution of the United States of America, ruling that the abortion of such a claim does not constitute a miscarriage of justice and therefore, is waived. The application of the rule of Lawson by the Pennsylvania Supreme Court in the instant case is in error since the principle in Lawson, at most, can apply only to a non-constitutional violation.

More importantly, the application of Lawson in the instant case is in violation of Petitioner's constitutional rights both under the Fifth Amendment of the Constitution of the United States of America requiring Due Process of Law and the Sixth Amendment of the Constitution of the United States requiring effective assistance of counsel, as well as prohibitions against violation of the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States of America. Petitioner

respectfully submits that your Honorable Court cannot condone the application by a State Court, seeking to limit post conviction relief for two violations of constitutional law.[5]

The Petitioner respectfully submits that the Supreme Court of Pennsylvania has misapplied its own decisional authority or, more importantly, has applied decisional authority in contravention of Petitioner's constitutional rights under the Fifth and

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[5]Parenthetically, the Pennsylvania Supreme Court in applying Lawson, held that the ineffective assistance of counsel for the failure to plead Double Jeopardy could have been, but was not put forth in the first Post Conviction Hearing Act Petition and thus, was waived. The Court obviously avoided Appellee's contention that such a failure in and of itself constituted ineffective assistance of appellate counsel. In Appellee's first pro se petition, raising such issue to the Superior Court of the Commonwealth of Pennsylvania at 62 Pittsburgh 1978, Appellee was successful to the extent that the Superior Court reversed and remanded the case by Order of June 30, 1986, to determine "if trial and PCHA counsel were ineffective for failing to raise the double jeopardy claim." A.54-61.

Sixth Amendments of the Constitution of the United States of America. Simply stated, Petitioner's previous guilty plea and counsel's failure to raise the claim of double jeopardy, cannot be deemed to constitute a waiver of such issue. This is especially accurate when the pro se post conviction relief was successful, at least, to the extent the case was remanded to determine if the previous trial and/or appellate counsel was ineffective. Ironically, Petitioner's appeal after remand was deemed to be meritorious by the Superior Court of Pennsylvania, A.54-61, and inferentially by the Supreme Court of the Commonwealth of Pennsylvania in the concurring Opinion of Mr. Chief Justice Nix. A.14-16.

The Petitioner respectfully requests your Honorable Court to adjudge, based upon the Concurring Opinion's finding that the failure to raise such claim constitutes

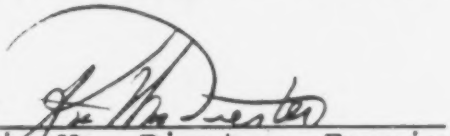
ineffective assistance of both trial counsel and appellate counsel in violation of the Sixth Amendment of our Constitution that Petitioner's right to assert a violation of his constitutional rights has not been waived. Petitioner urges your Honorable Court to decree that Petitioner's assertion of such violation of his rights does not constitute an abuse of the post conviction relief process.

VII. Conclusion.

For these reasons, Petitioner, Bernard D. Ryan, asks that a writ of certiorari issue to the Supreme Court of the Commonwealth of Pennsylvania and to thereafter vacate the Order of the Supreme Court of Pennsylvania, which illegally reinstated the Judgment of Sentence and conviction.

Respectfully submitted,

SCOTT, VOGRIN & RIESTER

BY 

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APPENDIX

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SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	)	No. 2 W.D. Appeal Docket 1989
APPELLANT	)	Appeal from the Order of the Superior Court
VS.	)	entered May 19, 1988 at No. 874 Pittsburgh
BERNARD D. RYAN,	)	1987 reversing the Order of the Court of
APPELLEE	)	Common Pleas of Elk County, Criminal Division entered June 8, 1987 at No. 89 of 1978
	)	379 Pa. Super. 664, 545 A.2d 388 (1988)
	)	Submitted: September 25, 1989

JUDGMENT

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgment of the SUPERIOR COURT OF PENNSYLVANIA by, and the same is, hereby REVERSED AND APPELLEE'S RAPE CONVICTION REINSTATED.

/S/Irma T. Gardner
Deputy Prothonotary

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	)	No. 2 W.D. Appeal Docket 1989
APPELLANT	)	Appeal from the Order of the Superior Court
VS.	)	entered May 19, 1988 at No. 874 Pittsburgh
BERNARD D. RYAN,	)	1987 reversing the Order of the Court of
APPELLEE	)	Common Pleas of Elk County, Criminal Division entered June 8, 1987 at No. 89 of 1978
	)	379 Pa. Super. 664, 545 A.2d 388 (1988)
	)	Submitted: September 25, 1989

OPINION ANNOUNCING JUDGMENT OF THE COURT

MR. JUSTICE MCDERMOTT

FILED: JANUARY 8, 1990

Before the Court for resolution is the appellant Commonwealth's appeal from an order of the Superior Court (memorandum opinion by Watkins and Cercone, JJ., with Olszewski, J., dissenting) which arrested the judgment of sentence and discharged the Appellee Bernard D. Ryan. The pertinent

facts are as set forth below.

In June, 1978, the appellee was arrested and charged with rape (18 Pa. C.S.A. §3121), aggravated assault (18 Pa. C.S.A. §2702 and indecent assault (18 Pa. C.S.A. §3126). The crimes occurred in Elk County, Pennsylvania. A trial was scheduled to begin on October 10, 1978, the Court was notified by the District Attorney, through the Court Administrator, that an essential Commonwealth witness was ill and would not be available to testify the next day at trial. Consequently, the Commonwealth requested a continuance or a postponement in the alternative. On November 8, 1978, a second jury was selected and sworn, with the trial scheduled to being on November 15, 1978. On November 13, 1978, before the start of trial, the appellee pleaded guilty to the charge of rape and the second jury was dismissed. Subsequently, the appellee was

sentenced to one and one-half (1 1/2) to three (3) years imprisonment, pursuant to the agreed upon plea-bargain. There was no direct appeal from the judgment of sentence.

After the appellee completed his sentence and was released, he filed his first PCHA petition challenging the validity of his conviction on November 29, 1982. Simultaneously, he also filed a motion to withdraw his guilty plea. The lower court denied the petitions, and he appealed to the Superior Court, which affirmed the judgment of the lower court on April 4, 1985 at No. 1316 Pittsburgh 1983. We subsequently denied his petition for allowance of appeal on September 23, 1985.

The appellee then filed a second PCHA petition, pro se, in which he argued that trial counsel was ineffective for failing to raise trial counsel's ineffectiveness as to this issue. The petition was summarily

dismissed by the Elk County Court of Common Pleas, and a pro se appeal was then filed with the Superior Court.

The Superior Court found the trial court record wholly inadequate as to the rationale behind the dismissal of the first jury. The case was remanded for a hearing and determination of whether prior counsel were ineffective in failing to raise the issue of double jeopardy.

On remand, the same judge who presided over the case in 1978 conducted the evidentiary hearing, the original district attorney on the case, the original defense counsel, and the previously unavailable Commonwealth witness all testified at the hearing. At the close, the court dismissed the petition and an appeal was taken to the Superior Court.

On appeal four issues were raised. The court considered only the issue of whether the respondent's prior counsel were

ineffective for failing to raise the double jeopardy issue. The Superior Court found that the trial court abused its discretion in finding "manifest necessity" to declare a mistrial, which consequently had the effect of placing the appellee in double jeopardy. The Court noted that when the trial court declared a mistrial, no contemporaneous record was made which would have reflected the evidence presented, if any, the understanding of the court or the parties, or whether appellant had agreed to the grant of a mistrial. Accordingly, the trial court's order was reversed, the judgment of sentence arrested, and the respondent was discharged. The Commonwealth now appeals.

The Commonwealth's appeal presents essentially three issues: whether the Superior Court erred when it arrested the trial court's judgment on the basis of finding a lack of "manifest necessity" to

declare a mistrial, whether counsel were ineffective for failing to raise the issue; and whether the relief granted by the Superior Court of Pennsylvania No. 874 Pittsburgh 1987, is in error as contrary to our holding in Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988).

Although the Commonwealth articulates several arguments of substantial merit, there is a larger issue before us, and that issue is whether the Superior Court's holding is contrary to our ruling in Commonwealth v. Anthony, 504 Pa. 551, 475 A.2d 1303 (1984), a case which addressed the significance of the guilty plea for one who filed a PCHA petition seeking a reversal of his conviction. Appellee argues trial counsel and counsel at his first PCHA hearing were ineffective for failing to raise the issue of double jeopardy, and thus his conviction should not stand. However, irrespective of the

procedural issues raised by the parties, the fact the appellee pleaded guilty to the charge of rape is of vital significance. As we have held:

> "A guilty plea is an acknowledgement by a defendant that he participated in the commission of certain acts with a criminal intent; he acknowledges the existence of facts and intent; facts he acknowledges may or may not be within the powers of the Commonwealth to prove."

Anthony, supra at 558, 1307.

A defendant may plead guilty for any reason: to shield others, avoid further exposure, to diminish the penalty, to be done with the matter, or any secret reason that appeals to his needs. Id. The appellee pled guilty after the declaration of the mistrial and after the second jury was sworn in, but before the commencement of the second trial. He himself decided to acknowledge his guilt by pleading guilty prior to the beginning of the second trial. The plea of guilt admits that the facts and intent occurred, and is a confession not

only of what the Commonwealth might prove, but also as to what the defendant knows to have happened. Id. There is no evidence on record that would indicate that the appellee was coerced into pleading guilty by the fact that his counsel failed to object on the issue of double. What is generally and most objectively accepted is that a plea is offered to relieve conscience, to set the record straight and, as earnest of error and repentance, to accept the penalty. Id.

The record indicates that appellee's change of heart regarding his acknowledgement of guilt came substantially after he had served his sentence in prison. The appellee was released on parole after his imprisonment for the Elk County rape conviction he is now appealing before us. Following his release on parole, the appellee was tried and convicted for a rape-related offense in Warren County. In

this appeal, he is attacking his Elk County conviction because of the consideration it was given as a prior offense by the sentencing judge in the subsequent Warren County case for which he is now imprisoned. Should this court ultimately overturn the prior conviction in Elk County, the sentencing judge in Warren County would be required to resentence him.

The appellee clearly had the opportunity to raise this issue of ineffective assistance of counsel in a post-trial motion or in his first PCHA petition. He elected not to do so. It is obvious from the record that his first PCHA petition and this second PCHA petition, filed pro se, have been filed din order to attack the validity of the sentence he received after being convicted of rape in Warren County. The appellee is attacking his first rape conviction by claiming his counsel was ineffective for failing to

raise a double jeopardy claim; however, if a defendant voluntarily, knowingly and intelligently wishes to acknowledge facts that in themselves constitute an offense, that acknowledgment is independent of the procedures o proving or refuting them. Id. The transcript of the guilty plea colloquy indicates that the defendant made a voluntary, knowing, and intelligent plea of guilty, and was fully aware of the consequences of his actions.

It is well established that the defendant who pleads guilty is there to voluntarily say what he knows occurred, and that he will accept the legal meaning and legal consequences of what he had done. Id.

In this instance, we have an appellee who is unwilling to accept the consequences of his acknowledgement of the felonious act he committed in 1978. to reiterate, he has filed this petition because he has been convicted in Warren county for the rape

related offenses, and this 1978 conviction became a burden on his second conviction. The appellee is utilizing a procedure generously afforded to him by the PCHA legislation to attack another conviction in an entirely unrelated matter in the hopes of diminishing the length of the sentence for his second conviction. His efforts are for nought. When a defendant pleads guilty, all that is required is that he understand have knowledge of the nature of the offense in as plain a fashion as possible, and that the court be satisfied that the defendant understands and is willing to act on his understanding. Id. There is nothing in the record to indicate that theses requirements have not been met. Consequently, the Superior Court is hereby reversed and the appellee's rape conviction reinstated.

Mr. Chief Justice Nix files a concurring opinion in which Mr. Justice

Papadakos joins.

Mr. Justice Lawson files a concurring opinion.

Mr. Justice Zappala concurs in the result.

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 2 W.D. Appeal Docket 1989
APPELLANT	Appeal from the Order of the Superior Court
VS.	entered May 19, 1988 at No. 874 Pittsburgh
BERNARD D. RYAN,	1987 reversing the Order of the Court of
APPELLEE	Common Pleas of Elk County, Criminal Division entered June 8, 1987 at No. 89 of 1978
	379 Pa. Super. 664, 545 A.2d 388 (1988)
	Submitted: September 25, 1989

CONCURRING OPINION

NIX, C. J. FILED: JANUARY 8, 1990

In this case the majority reaches the correct result but for a wholly improper reason. the majority opinion turns on the use of a guilty plea, citing Commonwealth v. Anthony, 504 Pa. 551, 475 A.2d 1303

(1984). I disagree with that analysis for two reasons: first, the ineffective assistance of counsel claim impacts upon the validity of the guilty plea. The failure of the trial court to ascertain the actual condition of the allegedly ill Commonwealth witness prevents a finding of manifest necessity required to justify a declaration of a mistrial and the avoidance of a double jeopardy claim upon retrial. Failure of counsel to reads the double jeopardy claim as well as counsel's acquiescence in a guilty plea under the circumstances of the second trial clearly constituted ineffective assistance of counsel. Thus, our analysis may not rest on the consequences of a guilty plea.

Second, under Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988), a second PCHA petition should be dismissed absent a "strong prima facie showing. . . that a miscarriage of justice may have occurred."

Lawson, 519 Pa. at 513, 549 A.2d at 112. The abortion of a double jeopardy claim does not in itself represent a "miscarriage of justice." Such a claim is an affirmative defense and may be waived. Commonwealth v. Gilman, 485 Pa. 145, 401 A.2d 335 (1979); Commonwealth v. Peters, 473 Pa. 72, 373 A.2d 1055 (1977). Ineffective assistance of counsel for failure to plead double jeopardy could have been, but was not, put forward in the first PCHA petition. thus, the rule of Lawson now applies.

Therefore, for the reasons stated above, I concur in the result of reversing the order of the Superior court and reinstating the conviction for rape.

Mr. Justice Papadakos joins in this concurring opinion.

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 2 W.D. Appeal Docket 1989
APPELLANT	Appeal from the Order of the Superior Court
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	Submitted: September 25, 1989

CONCURRING OPINION

JUSTICE ROLF LARSEN FILED: JANUARY 8, 1990

While I agree with the majority that the Superior Court must be reversed and appellee's rape conviction reinstated, I do so because I believe that appellee failed to sustain his burden of demonstrating sufficient reasons why a court should

entertain his second PCHA petition under Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988). Lawson held that "a second or any subsequent post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred." Id. at 513, 549 A.2d at 112 (emphasis added).

Accordingly, the court of Common Please of Elk County acted properly and well within its discretion when it summarily dismissed appellee's second PCHA petition, and Superior court erred in reversing the Court of Common Pleas and remanding for an evidentiary hearing concerning the effectiveness of prior counsel.

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	)	
V.	)	No. 874 Pittsburgh 1987
BERNARD D. RYAN,	)	
APPELLEE	)	

ORDER

AND NOW, this 19th day of MAY, 1988, it is ordered as follows:

Order reversed. Judgment of sentence arrested and appellant discharged.

BY THE COURT

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

A.19

COMMONWEALTH OF PENNSYLVANIA,	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	)	No. 874 Pittsburgh 1987
BERNARD D. RYAN,	)	
APPELLEE	)	

Appeal from the PCHA June 8, 1987
in the Court of Common Please of Elk County
Criminal Division, No. 89 of 1978

Before: OLSZEWSKI, WATKINS and CERCONE, JJ.

MEMORANDUM: FILED: MAY 19, 1988

This is an appeal from the Order of the Court of common Please of Elk County dated June 8, 1987, dismissing appellant's petition filed pursuant to the Post Conviction Hearing Act (PCHA).1

The following facts are not in dispute. Appellant was arrested in June, 1987 and charged with rape, aggravated assault and indecent assault. the alleged crimes occurred in Elk County. On September 11, 1978, a jury was impaneled and sworn to hear the trial of the case

against appellant. Trial was scheduled to begin October 11, 1978. On October 10, 1978, the District Attorney notified the Court through the court administrator that an essential Commonwealth witness was ill and would be unavailable to testify the next day at trial. The Commonwealth then requested a continuance or a postponement. the record is silent as to what actually occurred other than that on November 8, 1987, a second jury was selected and sworn, with trial scheduled to commence on November 15, 1978.2 However, on November 13, 1978, appellant entered a plea of

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1 42 Pa.C.S.A. Sec. 9541 et seq.

2 Apparently neither the district attorney nor appellant's counsel requested a hearing or advised the Court of their respective positions concerning the continuance of the case or the dismissal of the jury.

guilty to the charge of rape and the second jury was dismissed. On the same day, pursuant to an agreed upon plea bargain, appellant was sentenced to one and one-half (1-1/2) to three (3) years imprisonment. no direct appeal was taken from the judgment of sentence.3

The following entry of the plea, appellant filed his first PCHA petition and new counsel was appointed to amend

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3 Ordinarily a party on appeal who seeks to challenge a guilty plea must first have filed a motion to withdraw the plea. Pa.R.Crim.P., Rules 319-321, 42 Pa.C.S.A. However, where as here, an appellant attacks a plea of guilty on the basis that trial counsel's ineffectiveness contributed to the plea, the courts have permitted review of the claim on the merits. Commonwealth v. Miller, 495 Pa. 177, 433 A.2d 1 (1981). in the case sub judice the guilty plea colloquy transcript reveals that appellant was not informed that he was waiving his right to raise a constitutional challenge on appeal nor was he informed that the rules of procedure require a timely challenge to his plea. Accordingly, we will entertain the appeal on the merits.

the petition and further represent appellant in the proceedings. This petition was dismissed after a hearing. A panel of this court affirmed the PCHA court's decision. The Supreme Court denied appellant's petition for allowance of appeal.

Appellant then filed a second PCHA petition, pro se, in which he argued that trial counsel was ineffective for failing to move for dismissal of the case on double jeopardy grounds and that PCHA counsel was ineffective for failing to read trial counsel's ineffectiveness as to this issue. The petition was summarily dismissed. Appellant filed a pro se appeal, prompting a panel of this court to note that the record before it was wholly inadequate as to the reasons for the dismissal of the first jury.

Therefore, this case was reversed and remanded for an evidentiary hearing and

determination of whether prior counsel were ineffective in failing to raise the issue of double jeopardy.

On remand, an evidentiary hearing was conducted by the same judge who had presided over this case in 1978, the Honorable Paul B. Greiner, Senior Judge, specially presiding. At the hearing, testimony was taken from three individuals, they being the original district attorney on the case, the original defense counsel, and the allegedly unavailable commonwealth witness. Following the close of the hearing, the court determined that appellant's prior counsel were not ineffective and dismissed the PCHA petition. This appeal followed.

On appeal, appellant raises four issues for our review. Appellant asserts that he was denied the effective assistance of counsel because all prior counsel failed to (1) raise the issue of double jeopardy;

(2) object to the lack of jurisdiction of the court entertaining entry of the guilty plea; (3) request a hearing or compel the attendance of appellant at a critical stage of the proceedings, that is, when the jury was dismissed sua sponte; and, (4) investigate and advise the appellant as to the availability of an alleged essential witness. Because of our disposition of this case on the double jeopardy claim, we need not address the remaining claims.

The trial judge may declare a mistrial only for reasons of "manifest necessity". See Pa.R.Crim.P., Rule 1118, 42 Pa. C.S.A. In Commonwealth v. Dull, 257 Pa. Super. 192, 390 A.2d 777 (1978), the trial judge failed to ascertain the actual condition of a prosecution witness who had taken ill during the course of the trial, before declaring a mistrial. This court held that, under the circumstances, the trial court was not justified in declaring a

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mistrial because of the witness' illness.

The Court stated:

> In Commonwealth v. Strop, 244 Pa. Super. 173, 366 A.2d 1243 (1976) [,] we stated:
>
> A trial judge "may declare a mistrial only for reasons of manifest necessity"[,] Pa.R. Crim.P. 1118(b). This "manifest necessity" test or standard must be grounded upon a consideration of the importance to the defendant to be tried by the tribunal first impanelled ... this standard has been held to include attention to the cause of public justice. The "Government [has] the right to retry a defendant after a mistrial only where "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." United States v. Wilson, 420 U.S. 332, [344], 95 S.Ct. 1013, 43 L.Ed.2d 232 ... (1975), citing United States v. Perez, 9 Wheat. (22 U.S.) 578, 580, 6 L.Ed. 165 ... (1824).
> If the appropriate circumstances of manifest necessity and interests of justice do not exist, then the double jeopardy clause of the Fifth Amendment of the United States Constitution prevents retrial ... This rule was made applicable to the states through the Fourteenth Amendment ... However, "another trial is allowable where a court sua sponte declares a mistrial without the defendant's consent and over his objection where 'manifest necessity' justifies the declaration of the mistrial" ... Id., at 179-80, 366 A.2d at 1251 (Citations omitted; emphasis supplied.)

* * *

> So here: The trial judge had no "definite diagnosis" of Mr. Hovanec's (witness) condition. He therefore did not have facts that justified "subjecting appellant[s] to the continuing ordeal of a pending trial." At the least the judge should have continued the case to ascertain mr. Hovanec's condition before determining that a mistrial was necessary.

Commonwealth v. Dull, 257 Pa. Super. at __, 390 A.2d at 779-80. Likewise, in Commonwealth v. Ferguson, 446 Pa. 24, __ A.2d ___ (1971), the Pennsylvania Supreme Court concluded that the trial court had erred in granting a mistrial when a Commonwealth witness allegedly took ill. In that case, the district attorney informed the court that the witness' wife had called to inform him the witness had subclinical pneumonia. The witness' doctor, however, would not verify the condition nor give a prognosis. In determining that the declaration of a mistrial was too drastic a remedy, the

Supreme Court stated:

> [W]e do not believe that the facts in the instant case justified the granting of a mistrial at the time of the district attorney's request. The trial court could have ... grant[ed] a continuance until there was a definite diagnosis of [witness'] condition. the court could even have sent the jury home early for the day until more was known about [witness'] health. If he in fact did have pneumonia, then the mistrial could have been granted on the bills in which his testimony was needed. But anything less than a definite diagnosis, introduced with more formality than merely the introduction into evidence of the fact of the telephone call of the undoubtedly nervous wife of the prosection witness, does not give the trial court ample grounds for subjecting appellant to the continuing ordeal of a pending trial.

Id. at 29-30, __ A.2d at ___.

As previously stated, in the case at hand, no contemporaneous record was made which would have reflected the evidence presented, if any, the understanding of the court or the parties, or whether appellant had agreed to the grant of mistrial. Of further concern to us is the fact that, upon this court's remand for evidentiary

hearing on the issue of double jeopardy, the Commonwealth was still unable to put facts into the record which would show "manifest necessity" had appellant's trial counsel timely objected to the grant of mistrial. It is significant to note that at the remand hearing, the prosecuting district attorney was unable to state that he had ascertained the length of the witness' disability nor did he request the court to grant a continuance within the term of court then sitting. Further, the doctor witness himself was unable to recall how long he had actually been laid up with his illness in 1978. Finally, the district attorney's testimony was not persuasive that the unavailable witness was actually an essential witness. The record reflects that the victim in this case knew the appellant on a social basis and had had an intimate relationship with him in the past. While the doctor may have added weight to

her claim that appellant had assaulted her, that evidence would merely have been cumulative to the victim's available testimony.

Accordingly, if the Commonwealth had wished to show "manifests necessity" and to persuade the trial court to engage in such an extraordinary exercise of discretion, it should have offered more substantial evidence.

Order reversed. Judgement of Sentence arrested and appellant discharged.4

Olszewski, J. files a Dissenting Statement.

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4 We note for the record that, in this case, appellant has fully served the sentence imposed upon him. The result of our order will be merely to clear his record of this conviction.

COMMONWEALTH OF PENNSYLVANIA,	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	)	
BERNARD D. RYAN,	)	
APPELLEE	)	No. 874 Pittsburgh 1987

Appeal from the PCHA June 8, 1987
in the Court of Common Please of Elk County
Criminal Division, No. 89 of 1978

Before: OLSZEWSKI, WATKINS and CERCONE, JJ.

DISSENTING STATEMENT BY OLSZEWSKI, J.:

I respectfully dissent. I do not believe that the trial court abused its discretion in finding manifest necessity to declare a mistrial. Therefore, I would find that the PCHA court properly dismissed appellant's challenge to prior counsel's effectiveness for failing to raise the issue of double jeopardy.

IN THE COURT OF COMMON PLEAS
OF THE FIFTY-NINTH

JUDICIAL DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Plaintiff	*	COUNTY BRANCH - ELK
VS.	*	CRIMINAL
BERNARD D. RYAN, Defendant	*	No. 89 of 1978

MEMORANDUM OPINION
AND ORDER OF COURT

Defendant was arrested in June 1978 for rape and related offenses. On September 11, 1978, a jury was empaneled and sworn with trial to commence October 11, 1978. On October 10, 1978, the District Attorney of Elk County, James A. Meyer, notified the Court that a Commonwealth witness, Dr. Steven Chilian, who performed the medical examination on the alleged rape victim and whose testimony was essential to the Commonwealth case, was

ill with phlebitis, and requested a continuance or postponement. The Court granted same without hearing and dismissed the jury. The defense counsel was notified and, as he testified at remand hearing January 15, 1987, because of his long standing professional relationship with the District Attorney, he accepted the District Attorney's advice as being true and correct and did not request a hearing challenging the illness of Dr. Chilian. A second jury was empaneled and sworn on November 8, 1978, and trial was slated to begin one week later. Although trial counsel admitted that he did not specifically investigate the availability of Dr. Chilian on September 11, 1978, and November 15, 1978, the District Attorney's voir dire on November 8, 1978, represented that Dr. Chilian would be a witness and again during the guilty plea colloquy, November 13, 1978, the District Attorney, in presenting

the factual basis on which the Court could accept the plea, he again stated that Dr. Chilian would be a witness. Trial counsel and the Court accepted the District Attorney's statements on the record on both occasions as being true and correct and had no reason to doubt same.

The alleged crimes occurred in Elk County, then and now together with Cameron County comprises the Fifty-Ninth Judicial District. the writer was then the President Judge and only Judge for said district, and to accommodate parties and the Court, the plea was received while the Judge was presiding in Emporium, the county seat of Cameron County, 30 miles from Ridgway, the county seat of Elk County. There was no specific waiver on the record by the defendant of any alleged right to have his plea entered in Elk County.

As a result of plea bargaining, the defendant was sentenced to one and one-

half to three years imprisonment, was released on parole and subsequently tried and convected in Warren County on a charge of rape-related offenses. The defendant now challenges the effectiveness of counsel of the instant case because of the consideration given to it as a prior offense by the sentencing judge in the subsequent Warren County case for which he is now imprisoned.

Defendant subsequently filed his first PCHA petition and new counsel was appointed to amend the petition and further represent defendant in the proceedings. This petition was dismissed after hearing and a panel of the Superior Court affirmed the PCHA Court's decision. Commonwealth v. Ryan, Pa. Super., 495 A.2d 614 (1985). The Supreme Court denied defendant's petition for allowance of appeal. Defendant subsequently filed a second PCHA petition, pro se, which was summarily dismissed by

this Court. By Memorandum and Order dated June 30, 1986, a Superior Court panel to No. 00062 Pittsburgh 1986, dismissed the first allegation of the pro se appeal relative to alleged conflict of interest but reversed and remanded the case to determine if "trial and PCHA counsel were ineffective for failing to raise the double jeopardy claim," defendant having argued that counsel should have moved for dismissal because it was not "manifestly necessary" to dismiss the first jury. In addition to the issue of "manifest necessity," defendant raises the issue of whether trial counsel was ineffective for permitting entry of the plea in Cameron County when the information charged the offenses occurred in Elk County. As relates to the claimed ineffectiveness of counsel, this allegation is without merit. Commonwealth of Pennsylvania v. William C. Dilley, No. 306 Pittsburgh 1985 (Pa.

Super.), the Superior Court adopted the opinion of specially presiding Judge Snyder, President Judge of Jefferson County, in holding that no prejudice existed to the defendant nor was defendant's counsel ineffective in permitting an entry of a guilty plea in Jefferson County when the offense charge occurred in Elk County. In Dilley the facts are almost identical in that Brookville, the county seat of Jefferson County, is 36 miles from Ridgway, the county seat of Elk County and to save at least one-half day judicial time, the parties agreed that defendant's plea be entered before Judge Snyder in the Jefferson County Court House, Brookville.

We now address the fundamental issue of ineffectiveness of counsel for failure to raise the issue of double jeopardy pursuant to the Order of Remand.

In addressing this issue, we give

great importance to testimony presented by Dr. Chilian at the time of hearing on January 15, 1987. Dr. Chilian's testimony proved that, based on his phlebitic condition, he was not available for trial on October 11, 1978, and that he so informed District Attorney Meyer on October 10, 1978, and was not certain as to how long this condition would require him to be bedridden. We find that Dr. Chilian's presence as the examining physician of the victim, was necessary for the Commonwealth, as represented during the jury selection September 11, 1978, and thus his unavailability for trial on October 11, 1978, constituted a "manifest necessity" for continuance or postponement of the trial on October 11, 1978, and dismissal of the first jury.

It is well settled that a defendant may be retried after an earlier proceeding has terminated in a mistrial if there was

"manifest necessity" for the mistrial. Illinois v. Sommerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 425 (1973), as cited in Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 575 (1975), at page 576.

There is no doubt based on the testimony of former District Attorney James A. Meyer at hearing on January 15, 1987, that the testimony of Dr. Chilian was essential to the Commonwealth's case against the defendant. Because of the illness of the Commonwealth's essential witness (Dr. Chilian), there was no method by which the appellant's "valued right to have his trial completed by a particular tribunal," United States v. Jorn, 400 U.S. 470, 487, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), could be reconciled with the public interest in obtaining the adjudication of guilt or innocence. See Robson, supra.

Unlike the illness of a Commonwealth witness in Commonwealth v. Ferguson, 446

Pa. 24, 285 A.2d 189 (1971), wherein the Court required more evidence as to a medical diagnosis with respect to the ill witness, in this case the witness who called in ill was, in fact, a medical physician and, as such, the present case is thus distinguishable from Ferguson.

In United States ex rel. Gibson v. Zigel, 479 F.2d 773 (3rd Cir. 1973), it was held that "manifest necessity" was found where a key prosecution witness became ill during the trial and could not testify and the double jeopardy clause did not preclude defendant's retrial. The Court in Zigel, at 479 F.2d 773, 777, in quoting Mr. Justice Black in Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949), stated:

> "A Defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."

Having found that "manifest necessity" existed, we must determine whether the double jeopardy issue, under all the circumstances, was of such "arguable merit" so as to render counsel ineffective for failing to raise the same notwithstanding the fact the claim would be denied based on a finding of "manifest necessity."

The Superior Court of Pennsylvania in Commonwealth v. Cope, 518 a.2d 819 (1986) precisely sets forth the pertinent issues in determining a claim of ineffectiveness, as follows:

> "In reviewing a claim of ineffectiveness of counsel, we must first determine whether the claim which counsel failed to assert was of arguable merit.... Counsel will not be deemed ineffective for failing to assert a meritless claim.... If the underlying issue is of arguable merit, then a Court must determine whether the course chosen by counsel had a reasonable basis calculated to serve the best interest of the client.... In order to warrant a new trial, it must also be shown that counsel's dereliction prejudiced the outcome so as to

deprive the accused of a fair trial." (Underlining supplied).

In following the process utilized to determine a claim of ineffectiveness as set forth in Cope, supra., it is clear that the ultimate determination is whether the failure to raise a claim so prejudiced the outcome as to deprive the accused of a fair trial. Thus even assuming that arguable merit may have existed in raising the double jeopardy claim notwithstanding the finding of "manifest necessity," we must determine whether the failure to raise the claim served to prejudice the outcome. Having found that "manifest necessity" existed for discharging the first jury, the defendant was not prejudiced by his counsel's failure to raise a claim at the outset. The record indicates that the plea as entered was a culmination of plea negotiations wherein the defendant only obtained his sentence of one and one-half to three years for the charge of Rape, a

felony of the first degree. See plea colloquy of November 13, 1978.

It is not the prejudice to the defendant that must be determined but rather whether the "outcome" was prejudiced by any ineffectiveness on the part of counsel. In Cope, 418 A.2d 819, at page 821, it is stated that:

> "In order to warrant a new trial, it must also be shown that counsel's dereliction prejudiced the outcome so as to deprive the accused of a fair trial." Emphasis supplied.

The Court concludes that "manifest necessity" existed for dismissing the first jury, and that the claim of ineffectiveness of counsel is not of "arguable merit" and that the course chosen by counsel had a reasonable basis calculated to serve the best interest of the client. Further, in any alleged dereliction of counsel did not prejudice the outcome so as to deprive the accused of a fair trial.

In accordance with the foregoing, we make the following:

ORDER

AND NOW, to wit, this 8th of June, 1987, defendant's PCHA petition is dismissed.

BY THE COURT:

/s/ Paul B. Greiner
Senior Judge
Special Presiding

IN THE COURT OF COMMON PLEAS OF ELK COUNTY, PENNSYLVANIA, FIFTY-NINTH JUDICIAL DISTRICT

COMMONWEALTH OF PENNSYLVANIA
VS.

BERNARD D. RYAN,

DEFENDANT

ELK COUNTY
BRANCH

CRIMINAL DIV.

NO. 89 OF 1978

SUPPLEMENTAL AMENDED POST CONVICTION HEARING ACT PETITION

CODE:

FILED ON BEHALF OF DEFENDANT, BERNARD D. RYAN

COUNSEL OF RECORD FOR THIS PARTY:

KIM WM. RIESTER, ESQUIRE
PA I.D. NO. 19920

SCOTT, VOGRIN & RIESTER
FIRM NO. 571
1320 FRICK BLDG.
PITTSBURGH, PA 15219
412-261-0905

IN THE COURT OF COMMON PLEAS OF ELK COUNTY, PENNSYLVANIA, FIFTY-NINTH JUDICIAL DISTRICT

COMMONWEALTH OF PENNSYLVANIA VS.	ELK COUNTY BRANCH
	CRIMINAL DIV.
BERNARD D. RYAN, DEFENDANT	NO. 89 OF 1978

SUPPLEMENTAL AMENDED POST CONVICTION HEARING ACT PETITION

TO THE HONORABLE, THE JUDGES OF SAID COURT:

AND NOW, comes the Defendant, BERNARD D. RYAN, through his attorney, Kim Wm. Riester, Esquire, pursuant to the Pennsylvania Post Conviction Hearing Act, 42 Pa. C.S.A. §9541, et seq., and in support thereof, states as follows:

1. On June 6, 1978, Defendant was arrested and charged with Rape and other related offenses.

2. That a jury was impaneled and sworn on September 11, 1978, but was dismissed without hearing, and without the consent or notice to the Defendant.

3. That the only reference in the record as the reason for dismissing the jury is the subsequent statement of trial counsel that "we had fully intended on trying the case one previous time and the witness was ill. Since that time, we have reached a plea bargain agreement" (see Plea Hearing Transcript dated November 13, 1978, page 3).

4. Without any further motions by trial counsel or a request for an investigation as to the veracity of the assertions of the (a) illness of the witness; (b) essentiality of the witness's testimony or (c) prognosis of the illness and/or the future availability of the witness.

5. On November 8, 1978, Defendant and trial counsel selected a second jury, and trial was set for November 15, 1978.

6. On the November 13, 1978, the Defendant entered a plea to the above-

captioned crimes in the Court of Common Pleas of Cameron County.

7. On November 13, 1978, Defendant was sentenced to a period of one and one half to three (1-1/2 to 3) years incarceration.

8. Neither trial counsel nor PCHA counsel objected to any of the aforementioned matters.

9. The foregoing dismissal of the jury, which is tantamount to a declaration of a mistrial, sua sponte, without manifest necessity, constitutes a violation of double jeopardy clause of the Fifth Amendment of the Constitution of the United States of America and Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania. Illinois v. Sommerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); United States v. Perez, 22 U.S. (9 Wheat)

579 6 L.Ed.2d 165 (1824). See also Commonwealth v. Robson, ___ Pa. ___, 337 A.2d 573 (1975), which (a) reviews those decisional authorities which have found facts constituting "manifest necessity" and (b) found that the illness of a trial judge was justifiable under the circumstances. Contrast Commonwealth v. Brooks, 225 Pa. Super. 247, 310 A.2d 338 (1973) dealing with the illness of the prosecuting attorney, Commonwealth v. Wideman, 453 Pa. 119, 306 A.2d 894 (1973), involving the termination of trial by a visiting judge due to the limitation on the period of his assignment to the court where the case was tried, and Commonwealth v. Fergusson, 446 Pa. 24, 285 A.2d 198 (1978).

10. The Defendant respectfully submits that his constitutional right to Effective Assistance of Counsel as guaranteed by the Sixth Amendment of the Constitution of the United States of

America and Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania, was violated.

WHEREFORE, the Defendant, Bernard D. Ryan, respectfully requests your Honorable Court to dismiss the above-referenced case based upon a violation of his constitutional rights to effective assistance of counsel and/or a claim of double jeopardy.

Respectfully submitted,

/s/ Kim Wm. Riester, Esq.

IN THE COURT OF COMMON PLEAS OF ELK COUNTY, PENNSYLVANIA, FIFTY-NINTH JUDICIAL DISTRICT

COMMONWEALTH OF PENNSYLVANIA VS.	ELK COUNTY BRANCH
	CRIMINAL DIV.
BERNARD D. RYAN,	NO. 89 OF 1978
DEFENDANT	

PROOF OF SERVICE

I hereby certify that I am this 29th day of October, 1986, serving the foregoing Supplemental Amended Post Conviction Hearing Act Petition upon the persons and manner indicated below:

SERVICE BY FIRST CLASS MAIL ADDRESSED AS FOLLOWS:

Hon. Paul B. Greiner, J.
Fifty-Ninth Judicial District
Elk County Court House
Ridgway, PA 15853

David A. Frey, Esq.
Office of Prothonotary
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SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA

VS.

NO. 62 PGH, 1986

BERNARD D. RYAN,

APPELLANT

ORDER

AND NOW, this 30th day of June, 1986, it is ordered as follows:

Order reversed and case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

BY THE COURT:

/s/Eleanor R. Valecko
DEPUTY PROTHONOTARY

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA

VS.

NO. 62 PGH, 1986

BERNARD D. RYAN,

APPELLANT

Appeal from the Order in the
Court of Common Pleas of
Elk County, Criminal,
No. 89 of 1978.

Before: JOHNSON, HOFFMAN and LIPEZ, JJ.

PER CURIAM: FILED: JUNE 30, 1986

Order reversed and case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA	)	
VS.	)	
	)	NO. 62 PGH, 1986
BERNARD D. RYAN,	)	
APPELLANT	)	

Appeal from the Order in the
Court of Common Pleas of
Elk County, Criminal,
No. 89 of 1978.

Before: JOHNSON, HOFFMAN and LIPEZ, JJ.

MEMORANDUM:

This is an appeal from an order summarily dismissing defendant's second Post Conviction Hearing Act (PCHA) petition. Defendant was arrested in June, 1978, for rape and related offenses. In September, 1978, a jury was empaneled and sworn, and then dismissed. A second jury was empaneled and sworn on November 8, 1978 and trial was slated to begin one week later. Prior to trial, defendant entered a plea of guilty to the charge of rape (this was the result of a plea bargain).

Defendant was sentenced to one and one-half to three years imprisonment. Defendant subsequently filed his first PCHA petition and new counsel was appointed to amend the petition and further represent defendant in the proceedings. This petition was dismissed after a hearing, and a panel of this court affirmed the PCHA court's decision. Commonwealth v. Ryan, ___ Pa. Super. ___, 495 A.2d 614 (1985). The Supreme Court denied defendant's petition for allowance of appeal. Defendant subsequently filed a second PCHA petition, pro se, which was summarily dismissed. In this pro se appeal, defendant alleges that: (1) his counsel during the first PCHA proceeding, George Daghir, in pressing the claim of trial counsel's ineffectiveness was operating under a conflict of interest because both counsel were members of the Public Defender's Office; and (2) both counsel were ineffective for failing to

raise a double jeopardy claim. For the reasons discussed below, we reverse the order of the PCHA court and remand the case for a hearing.

The record discloses that on December 14, 1982, the court granted defendant's motion for assignment of counsel to prepare and file an amended PCHA petition and appointed George N. Daghir, Esquire, as "Special Elk County Public Defender to represent the defendant." In his reply brief, defendant grudgingly admits that Mr. Daghir was not a member of the Elk County Public Defender's Office. He asserts, however, that the lower court assigned Mr. Daghir "from time to time to ease the caseload on single [sic] Public Defender of that county." Defendant then refers to Mr. Daghir as having been a "part time member" of the Public Defender's Office. Finally, he asserts that Mr. Daghir was appointed full-time Public Defender of Elk County

during his representation of defendant in the PCHA proceedings.

Our search of the record reveals, however, that Mr. Daghir represented the defendant in two PCHA proceedings as specially appointed defender, not as a member of the Public Defender's Office. (When Mr. Daghir petitioned the lower court for counsel fees for having specially represented the defendant, his work included two PCHA proceedings and an appellate brief. Furthermore, the court's order directing the payment of counsel fees noted that the petition was filed on behalf of George Daghir, Esquire, of the law firm of Daghir and Daghir.). Therefore, in pressing a claim of ineffectiveness of trial counsel (the public defender), Mr. Daghir was not operating under a conflict of interest since he was not a member of the Public Defender's Office.

Defendant next argues that trial counsel was ineffective for failing to move for dismissal of the case on double jeopardy grounds and that PCHA counsel was ineffective for failing to raise trial counsel's ineffectiveness as to this issue. Defendant bases the underlying double jeopardy claim on the following events: In September, 1978, a jury was empaneled and sworn. The court subsequently dismissed the jury. A second jury was empaneled and sworn on November 8, 1978, and trial was slated to begin one week later. Prior to trial, defendant entered a guilty plea pursuant to a plea bargain. Defendant now argues that counsel should have moved for dismissal because it was not "manifestly necessary" to dismiss the first jury.

The only reference in the record as to the reason for dismissing the jury is found on page three of the guilty plea colloquy where defendant's attorney noted: "We had

fully intended on trying the case one previous time and the witness was ill, and since that time, we have reached a plea bargain agreement." (N.T. 11/13/78, 3). In its brief, the Commonwealth claims that the first jury was dismissed due to the illness of a key Commonwealth witness, Dr. Steven Chilian, who performed the medical examination on the alleged rape victim and whose testimony, therefore, was essential to the Commonwealth's case. But, as the Commonwealth admits, this evidence is not part of the record. This points to the fact that since defendant's PCHA petition was summarily dismissed, the record before us is wholly inadequate as to the reasons for the dismissal of the first jury. Therefore, we are unable to determine whether trial and PCHA counsel were ineffective for failing to raise the double jeopardy claim. Our only recourse is to remand the case to the PCHA court for a

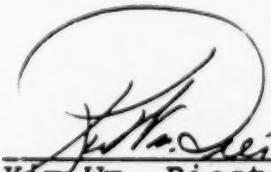
hearing on this issue. (The Commonwealth implies that the entire case is moot since defendant has already served his sentence on the rape charge. But an identical argument was recently rejected by this court in Commonwealth v. Markley, ___ Pa. Super. ___, 501 A.2d 1137 (1985).).

One final point is necessary. Defendant filed a motion for reconsideration of his PCHA petition which was not acted upon. The motion asked the court to reconsider its summary dismissal of the petition. Our remand of the case to the PCHA Court to decide the issues of trial and PCHA counsel's ineffectiveness renders this motion superfluous.

Order reversed and case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Certificate of Service

I hereby certify that a true and correct copy of the within Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania was served this by U.S. mail, first class, postage prepaid, upon Vernon D. Roof, Esquire, Courthouse, P. O. Box 448, Ridgway, Pennsylvania 15853, this 19th day of February, 1990.



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